



The Office of Vince Ryan
County Attorney

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September 17, 2015

Mr. Carl E. Edlund, P.E.
Director Superfund Division
United States Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

Re: San Jacinto River Waste Pits Site

Dear Mr. Edlund:

We are in receipt of your letter of August 14, 2015, and appreciate your responding to some of Harris County's concerns raised in our prior correspondence to the EPA. Like you, we value our working relationship with the EPA and want to express our gratitude for your continuing efforts on the San Jacinto River Waste Pits Site (the "Site"). Please consider this letter our response to some of the issues that you touch upon in your letter and our request for further response from the EPA on other points that we have raised in the past, and finally, this letter expresses our concern with certain fundamental failures with the United States Army Corps of Engineers' draft Evaluation of the San Jacinto Waste Pits Feasibility Study Remediation Alternatives ("USACE draft report").

Executive Summary. Based upon our previous correspondence, which is detailed below, and our initial review of the USACE draft report, we continue to have the following serious reservations regarding the PRPs' handling of the RI/FS and what we consider to be a failure of the USACE draft report to address those concerns. Briefly stated, here are our main points:

- **Conspiracy to Subvert the RI/FS.** The PRPs produced emails to our office in litigation in which they intentionally conspired together to subvert the RI/FS process. We have cataloged their communications establishing this conspiracy in several letters to the EPA. The PRPs have not denied it, and the EPA has unrefuted evidence detailing that conspiracy. Yet, to date, we are not aware of the EPA investigating this conspiracy or addressing the PRPs' efforts to violate the public trust in handling the RI/FS investigation.

- **PRPs' Consultants Have a Conflict of Interest.** In our prior correspondence to the EPA we have detailed how the project managers from Anchor and Integral refused to support the reports from their own companies, refused to identify who wrote specific portions of the reports, and claimed not to know the qualifications of the various contributors to the report. The project manager for one of the two consultants working the Site even refused to answer a direct question on whether she was an objective scientist or an advocate for the PRPs. We are not aware of the EPA taking any effort to address this issue, which again, we think constitutes a fundamental conflict of interest for the consultants and a subversion of the RI/FS process.
- **PRPs Withhold Documents from Public Review and Comment.** We have identified in several letters to the EPA the 44,000 documents that the PRPs have withheld from the EPA and the public. Your letter of August 14, 2015, provides no explanation for why the EPA will not require the production of these documents. Clearly, if the EPA had handled the RI/FS investigation itself, these documents would not be withheld from production on the claims of attorney client privilege, and there is no basis for permitting such a claim when the PRPs are afforded the opportunity to handle the investigation themselves. The EPA's response that these documents are not the type of documents that are usually produced is inconsistent with the fact that the privilege log: 1) does not identify the specifics of the documents to permit the EPA to draw that conclusion, 2) contains, as the EPA admits, laboratory analysis and data that have been withheld from production, and 3) was created by the PRPs who conspired to sell the temporary remedy as the final remedy to the EPA and the public.
- **USACE Draft Report Was Conducted Without Adequate Resources or Review of Existing Data and Information.** Harris County was never provided with an explanation as to why the EPA retained the USACE to conduct an evaluation of the feasibility study remediation alternatives, nor was it given an opportunity to meet with the USACE during the year that the USACE conducted its review and drafted the current report. Our review of the USACE draft report establishes that: 1) the USACE did not consider the potential impact upon the Site of hurricanes or tropical storms, which we think makes the draft incomplete, 2) the USACE did not consider the quarterly inspection reports for the armored cap showing the flaws in its design, construction, and maintenance, and 3) the USACE did not even review its own November 2013 report in which it identified serious flaws in the armored cap. Simply put, the USACE is now making comments and statements regarding the supposed viability of the armored cap for 500 years without looking at its own data showing that it did not last five years without needing repair and reassessment.
- **Request for Meeting.** As Harris County's ongoing involvement in the RI/FS process, its numerous letters to the EPA, and its filing litigation against the PRPs establishes Harris County and its citizens have an enormous interest in the Site. Through its efforts and investigation, it has uncovered a conspiracy to subvert the EPA's Superfund process, hide critical information, and to mislead the public regarding the nature of the investigation

and perhaps the public's safety and well-being. We renew our request for a meeting with your office and again with Administrator Curry to review our concerns. We will be seeking to schedule that meeting within the next 30 days.

Conspiracy to Subvert the RI/FS Process. We have provided the EPA with correspondence detailing the evidence that International Paper, Waste Management, McGinnes Industrial Maintenance Corporation, and their consultants, Anchor and Integral, have failed to comply with the EPA's requirements to conduct an unbiased and scientific investigation of the Site. That same evidence establishes that the PRPs have not prepared an objective analysis of the RI/FS. For your convenience, we are attaching copies of the letters we have previously sent to the EPA, including our April 2, 2014 letter to Ms. Foster, May 1, 2014 letter to the National Remedy Review Board, July 15, 2014 letter to Ms. Foster, July 21, 2014 letter to Ms. Foster, and July 2, 2015 letter to Administrator Curry requesting a meeting. In those letters, we have also identified other fundamental failings of the PRPs' handling of the RI/FS process.

PRPs' Consultants Have a Conflict of Interest. In our previous letters to your office, we detailed the internal communications, documents, and deposition testimony in which the PRPs' consultants Anchor and Integral discuss being able to intimidate the EPA officials at community meetings, conspire to make the Time Critical Removal Action ("TCRA") cap part of the permanent remedial action, recognize that if they did not "build a global consensus" that they "may be facing a dig and haul/burn as part of the final remedy," testify that they do not agree with the information contained in their reports that they provided to the government, not answer questions about the PRPs' attorneys editing, revising, or redrafting their reports, and could not identify who wrote portions of the reports nor identify the names of all persons who contributed to those reports. In fact, Integral's project manager went so far as to refuse to answer a direct question on whether she was an independent scientist or advocate for her clients (the PRPs) in performing work at the Site. We have detailed the inherent conflict of interest that permeates and infects Anchor and Integral's work on the Site because they were retained, not as objective scientists, but to further the litigation strategy of the PRPs. The PRPs themselves now *admit* that Anchor and Integral were actually retained to further their litigation strategy in conducting the RI/FS work and have documented this admission in their privilege log as the basis for why they claim they can withhold the RI/FS work forming the basis of the Feasibility Study from the public. This is in clear violation of the EPA's guidance that "PRPs' consultants have no conflict of interest with respect to the project."¹

Your letter of August 14, 2015 does not address these concerns or the evidence that Harris County provided to the EPA establishing a conspiracy to violate the federal statutes and regulations requiring an independent and objective investigation of the Site. If your office does not have the sufficient resources to pursue such an investigation, which we understand given the

¹ "Revisions to the Interim Guidance on PRP Participation in Remedial Investigations and Feasibility Studies," (OSWER 9835.2a, February 1989) at A-15 ("EPA Guidance").

budget limitations affecting all levels of government, we request that our correspondence and letters be forwarded to the EPA Office of the Inspector General at your earliest convenience.

Withholding Investigative Documents from Public Scrutiny to Cover-Up the Conspiracy. In your letter to our office of August 14, 2015, you state that the 44,000 documents that International Paper has withheld as privileged “do not appear to be the types of documents typically reviewed by EPA in the course of a site response action, even though,” as you concede, “they are related to site work.” You then make the statement that the stakeholders, including the EPA, Harris County, and the Port of Houston, have “performed extensive oversight of the work conducted by the PRPs under both the removal administrative order on consent and the unilateral administrative order.” You state that the EPA will “explore the possibility of obtaining the small portion of the documents directly related to the laboratories providing sample analysis, in the interest of ensuring that all appropriate information is considered in the final remedy selection and also addressing any public concern over this matter.”

On behalf of the people of Harris County, we appreciate your willingness to obtain the laboratory sampling analysis that have been intentionally withheld from the EPA, Harris County, the Port of Houston, and other stakeholders. We also want to thank you for taking this step to address “any public concern over this matter.” There is, of course, tremendous public concern about this Site and the potential harmful effects from exposure to dioxin, which is well documented in the public record. However, your letter does not resolve Harris County’s concern over being denied access to 44,000 documents that are relevant to the Site. Whatever the EPA’s practice may be in other sites, it should place these PRPs under increased scrutiny based upon the evidence that Harris County has provided of a conspiracy to violate the EPA’s rules and regulations requiring an unbiased investigation. The Unilateral Administrative Order governing the PRPs’ work at the Site clearly states that all records and documents that relate in any way to the Site shall be preserved. Moreover, if the EPA had handled the RI/FS process, there is no question that Harris County would be entitled to view the 44,000 documents, because the EPA would not be able to claim attorney client privilege or work product. The EPA should not permit PRPs who have conspired to provide what Harris County considers to be the least effective and cheapest remedy more protections from public scrutiny than the EPA would be afforded. Such a result by the EPA would allow the circumvention of the Superfund process itself. Finally, the description that the PRPs have provided of the 44,000 documents is frankly insufficient for the EPA, Harris County, or anyone else to determine whether they are the type of documents that should be disclosed in this Site that has such a tremendous impact on public health and safety. Again, if your office does not have sufficient resources to address this issue, we request that you forward our request for an investigation into the withholding of these 44,000 documents to the Office of the Inspector General.

Failure of the USACE to Consider Crucial Documents. The EPA has circulated the draft report of the United States Army Corps of Engineers entitled Evaluation of the San Jacinto Waste Pits Feasibility Study Remediation Alternatives and requested comments by September 10, 2015. Harris County provided comments to the USACE draft report, which our office joins. In addition to those comments, our office must highlight the fact that the USACE draft report

does not contain any reference to the following correspondence from Harris County: 1) Harris County's April 21, 2014 comments on the draft Final Interim Feasibility Study, 2) August 14, 2014 letter from Harris County's Technical Review Team, 3) February 24, 2015 letter from Harris County requesting additional sampling, 4) March 21, 2015 letter from TCEQ regarding additional sampling, and 5) June 19, 2015 letter from TCEQ regarding additional sampling.

The USACE draft report also does not contain any reference to the Site Armored Cap Inspection Reports either in the report itself or in the documents that the USACE said it reviewed to prepare the draft. The oversight is peculiar given that the USACE claims to be offering opinions regarding the viability of the armored cap for 500 years without looking at the actual performance of the cap since it was installed in 2011. Harris County does not understand how the USACE could evaluate the feasibility of the various remediation alternatives or reach any conclusions without considering these inspection reports, nor why it would even attempt to do so, especially given the serious issues we have raised in our correspondence to the EPA.

Even more concerning is the USACE's apparent failure to review its own report from November 2013. It should be noted that the USACE was required to investigate the armored cap in late 2013 because the cap was already showing visible signs of deterioration, meaning that in less than three years of its installation in the last half of 2011, the cap was eroding. On November 11, 2013, the USACE reassessed the cap and made the following statements in its report which reflect that the cap, which the USACE's draft report now implies might survive 500 years, did not even withstand three years without eroding and needing serious repair and reevaluation.

Here are some of the more salient comments from the USACE's report in November 2013—again none of which are mentioned in the USACE draft report from 2015:

- The armored cap “design should have considered wave run-up and overtopping as described in USACE Coastal Engineering Manual (Part VI) EM 1110-21100 (1 June 2006) as was performed in the Reassessment of Design and Construction (April 2013).”
- “The armor size . . . was generally appropriate, but the material did not meet the uniformity requirement for slopes steeper than 1V:3H.”
- “[t]he thickness of the armor material should have been adjusted to augment the natural slope to a surface slope of 1V:3H or flatter. Alternatively, sandy fill could have been placed on the natural foundation to flatten the slope to 1V:3H prior to placement of the geotextile.”
- “The construction specifications and testing for the Armour Cap B/C material were not adequate to ensure that the material had the design uniformity. A procedure should have been in place to verify the uniformity coefficient of the armor cap material.”

- “The repair plan should address the west berm armor instability adequately by placing uniform Armor Cap C natural rock in the maintenance area if a maximum slope no greater than 1V:3H is achieved.”
- As for armor design, “[a]dditional design considerations should include bearing capacity, slope stability of the foundation and the capping material, permeability, wave run-up and overtopping as described in the USACE Coastal Engineering Manual (Part VI) EM 1110-2-1100 (1 June 2006).”
- “The design and construction of the Western Berm are not well-described in the design and construction reports.”
- “The recycled concrete does not meet the desired uniformity coefficient without processing it through a coarse bar screen or grizzly screen to remove the fines. The sieve analysis on the B/C material presented in Appendix L of the Revised Final Removal Action Completion Report (May 2012) were inadequate to define the uniformity coefficient or the coefficient of curvature for the material.”
- “It is unclear what slope was used in the design analysis for sizing, but the steepest slope should have been used. Repair of the west berm should establish a surface slope no greater than 1V:3H to limit displacement during the combined action of waves and overtopping flow.”
- The inputs to the equation for parameterization of the stone size equation were not provided. The design velocity from the hydrodynamic model may not account adequately for the slope changes due to limitation in spatial resolution. The factor of safety may not have been adequate for the uncertainties in construction, slopes, material gradation, waves, non-uniform flow, flow constrictions and overtopping.
- The slope of the face of the berm just below the crown was much steeper than the design slope and was not modified prior to capping. For the non-uniform recycled concrete used for Armor Cap B/C, the design slope should have been 1V:3H or flatter to prevent excessive displacement and loss of gravel and sand size particles.
- The uniformity of the armor cap material was not specified. The material specifications allowed too much gravel and sand sized particles to be used, which could be eroded from the cap because they did not meet internal stability and retention criteria. Greater uniformity of the armor cap is preferable in the high energy regimes of the cap, particularly in the southwestern corner of the berm.

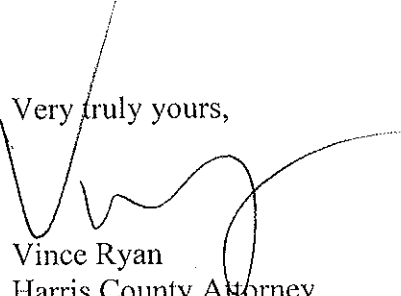
These are but a few of the USACE’s own numerous comments questioning the armored cap’s integrity, design, construction, and maintenance. The USACE did not apparently review

its own report from November 1, 2013 before circulating its 2015 draft report for review and comment. It is hard to understand how the USACE's draft report can be considered for final comment, much less completion, until it has considered its own previous review of the failings of the armored cap. If in fact, the USACE has not reviewed its earlier inspection report and conclusions regarding the armored cap, then Harris County requests that it do so and submit a more complete draft reflecting its review of that earlier information. If it has done so, then its analysis of its earlier investigation should at least be reflected in the USACE draft report.

Request for Meeting. In your letter of August 14, 2015, you state that you would be glad to meet with Harris County about the Site. We would welcome the opportunity to have such a meeting to discuss our concerns about the Site, the selection of the remedy, the PRPs' self-confessed efforts to pre-select the remedy prior to completing the RI/FS process, the intentional withholding of site-related documents from the public and the fundamental shortcomings we see in the USACE draft report. We would also like to discuss Harris County's plan on using the approximately \$20 million in settlement funds near the Site to avoid any interference with the EPA's efforts on the Site. We request that meeting to take place in the next 30 days.

Thank you for your attention to Harris County's concerns, and we looking forward to meeting to continue our discussions.

Very truly yours,



Vince Ryan
Harris County Attorney

cc: Mr. Robert Allen

Attachments